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Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS
LOCAL UNION NO. 32, UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this case the NLRB held that a union violated its duty of fair representation in the course of administering a hiring hall. There was no claim of discrimination based on union membership or activity. The first question is whether the NLRB had jurisdiction to hear the case.

2. In O'Neill, a fair representation case growing out of negotiations, the Court said that any "substantive examination of a union's performance . . . must be highly deferential. . . ." 499 U.S. at 78. The second question is whether the "highly deferential" standard adopted in O'Neill applies to a claim that the union breached its duty of fair representation in the course of administering a hiring hall.

3. In the event the first two issues are resolved against petitioner, a third question arises; namely, did the Petitioner, in the circumstances of this case, violate its duty of fair representation because it failed to use "objective criteria and standards in referring applicants for employment . . . ."

LIST OF INTERESTED PARTIES

The names of all parties to the proceeding appear in the caption of the case. Neither party has a parent company or subsidiary.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Local 32) petitions for a writ of certiorari to review the judgment of the United States

Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court below is reported at 50 F.3d 29 and is reproduced in the Appendix to the Petition (App.) at pages 1 - 31. The decision and order of the National Labor Relations Board (Board) are reported at 312 NLRB 1137 and appear at Appendix pages 33 - 34.

JURISDICTION

The judgment of the court below was entered on March 29, 1995. A petition for rehearing was filed on May 8, 1995 and denied on June 7, 1995. (App. p. 32) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 7, 8(a)(3), 8(b)(1), (2), 8(f) and 9(a) of the National Labor Relations Act as amended, 28 U.S.C. Sec.

141 et seq. (NLRA) are reproduced in the Appendix at pages 79 - 85.

STATEMENT OF THE CASE

Michael Flowers and William Harper (Charging Parties) filed unfair labor practice charges against Local 32. The charges allege that Local 32 "failed to dispatch [them] for arbitrary, capricious and invidious reasons." (R. 5-6)[1] An unfair labor practice complaint issued alleging that Local 32 "failed in its duty of fair representation." (R. 12) No other unfair labor practice was alleged. (R. 13, 262) The NLRB General Counsel did not contend that Local 32 "discriminated against [Charging Parties] but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation . . . ." (App. p. 47)

1. "R.___" refers to the joint deferred appendix filed in the court below.

The Administrative Law Judge (ALJ) in his post-trial decision concluded that Local 32 violated the NLRA "by failing to use objective criteria and standards in referring applicants for employment as rig welders . . . at the Longview, Washington job site." (App. p. 56) The Board affirmed pro forma. (App. p. 34) The court below granted the Board's petition for enforcement (App. p. 31) and denied Local 32's petition for rehearing. (App. p. 32)

The evidentiary facts are not in dispute. Local 32 maintained hiring lists for construction and maritime work but not for pipeline work (App. p. 41). There had been no pipeline work in the Local 32 area during the two years preceding the commencement of the Longview job. Ibid.

Pipeline work is controlled under a national agreement between the International Union and a national association of pipeline contractors. (App. p. 71) Local 32 was anxious to protect its jurisdiction over this work. Counsel stipulated that Local 32 therefore "had an interest in dispatching competent and reliable rig welders to the job." (App. p. 65) To this end, Local 32 "accumulated the names of individuals who were good at this work, reliable, and did not have drinking or drug-related problems." (App. p. 66)

To locate competent and reliable rig welders, Local 32 contacted other locals both within and outside the state of Washington and relied upon recommendations from business managers in other locals. (App. pp. 65-66) It also considered applicants who had contacted

Local 32 after learning about the job through trade publications or the sophisticated word-of-mouth network existing among pipeline welders. (App. p. 67)

Local 32 made a total of 15 rig welder dispatches to the Longview job (R. 341-343). It did not maintain or use a first-in, first-out system. (App. p. 67-68) The results were as follows: (a) two qualified members of Local 32 were dispatched but did not pass the welding test. Hence, no "members of [Local 32] worked as welders on the job" (App. p. 46-47); (b) no rig welders from the state of Washington were dispatched (App. p. 47); (c) five rig welders out of the total of the 15 dispatched were from Bakersfield, California Local 460 (R. 339-342) -- Charging Party Flower's home local union. (R. 151)

The ALJ held that a union acts unlawfully if it operates a hiring hall without establishing and following "objective standards". (App. p. 49) On the facts he concluded that "[w]hile the record shows that [Local 32 agents] Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used." (App. p. 51) Hence, he concluded Local 32 violated the NLRA "by failing to use objective criteria and standards in referring applicants for employment as rig welders." (App. p. 56) The Board affirmed without comment. (App. pp. 33-34)

Neither the ALJ nor the Board addressed Local 32's contention that the Board lacks jurisdiction over fair representation claims absent evidence of discrimination on account of union

membership or other protected activity. Neither the ALJ nor the Board addressed Local 32's claim that in fair representation cases, the "highly deferential" standard of review adopted in Airline Pilots v. O'Neill, 499 U.S. 65, 78 (1991) was controlling.

The court below addressed these issues, rejecting both. As to the authority of the Board, the court below said that this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967) decided the issue. (App. pp. 12-14) Rejecting Local 32's argument that the O'Neill "highly deferential" standard applied, the court below held that "a high standard" applied to union conduct when administering a hiring hall (App. p. 23) and "[a]bsent clear instructions from the Supreme Court, we decline to weaken this principle." (App. p. 24)

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN AIRLINE PILOTS V. O'NEILL, 499 U.S. 565 (1991).

Certiorari was granted in O'Neill "to clarify the standard that governs a claim that a union has breached its duty of fair representation in the negotiation of a back to work agreement terminating a strike." 499 U.S. at 67. The Court held "that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." 499 U.S. at 67. Given this standard, any "substantive examination of a union's performance must be highly deferential . . . ." 499 U.S. at 78.

The court below acknowledged this Court's statement that the "duty of fair

representation . . . applies to all union activity" including "instances in which a union . . . operates a hiring hall." (App. pp. 18-19) Nonetheless, the court below rejected O'Neill because a union operating "a hiring hall has assumed the role of an employer . . . ." (App. p. 22) How a union establishes itself as an "employer" by referring job applicants to a contractor who may or may not -- at his discretion[2] -- hire such workers is not explained. Nor did the court below attend to the fact that its linchpin

2. The applicable contract states (App. p. 72):

> "(G) the conditions to be followed in the initial hiring or replacement of employees are:
>
> (1) employer retains the right to reject any job applicant and may exercise the right before the union dispatches any employees required by employer. Upon request, employer will confirm by letter or telegram any verbal rejections made.

analogy was considered and rejected in Breininger v. Sheet Metal Workers, 493 U.S. 367 (1989). There the Court said (pp. 87-88):

> [The union] insists that petitioner has failed to state a [fair representation] claim because in a hiring hall setting, the union is acting essentially as an employer . . . .
>
> We cannot accept this proposed analogy. * * * That the particular function of job referral resembles a task that an employer might perform is of no consequence. The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation. (emphasis added)

In short, the union hiring hall equals employer status analogy adopted by the court below (App. p. 22) to avoid applying the "highly deferential" O'Neill standard does not survive Breininger. The analogy ignores the record: the contractor retained "the right to reject

any job applicant." (App. p. 72). The analogy fails.

In O'Neill, this Court said "the announced rule in Vaca . . . applies to all union activity", 499 U.S. at 67, including the operation of a hiring hall. 499 U.S. at 77. In O'Neill a "highly deferential" standard was adopted. The Court in O'Neill rejected the notion that different rules -- "a double standard" -- should be applied depending on the conduct under review. 499 U.S. 77. The court below refused to follow O'Neill and for this reason the petition should be granted.

II. THE OFTEN MOOTED ISSUE OF BOARD JURISDICTION OVER FAIR REPRESENTATION CLAIMS, UNRELATED TO DISCRIMINATION BASED ON UNION MEMBERSHIP, IS SQUARELY PRESENTED BY THE RECORD IN THIS CASE AND SHOULD BE DECIDED.

As noted earlier, this hiring hall case involves an unadorned fair

representation claim. Discrimination on account of union membership was not alleged, tried or found to be present. Whether in such cases the Board has "fair representation" jurisdiction is a question which this Court has reserved on five occasions. In DelCostello v. Teamsters, 462 U.S. 151, 170 (1982), the Court wrote:

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. E.g. Mirand Fuel Co., 140 NLRB 181 (1962) enf. denied 326 F.2d 172 (C.A. 2 1963). We have twice declined to decide the corrections of the Board's position[22] and need not address that question today. (Emphasis in original)
>
> 22. Vaca, supra, at 186; Humphrey, 375 U.S. at 344; see Mitchell, 451 U.S. at 67-68 n.3 (Stewart, J., concurring in the judgment).
>
> Accord: Ford Motor Co. v. Huffman, 345 U.S., 332 n.4 (1952); Plumbers Union v. Borden, 373 U.S. 690, 696 n.7 (1962).

The issue reserved in Borden, DelCostello, Huffman, Humphrey, and Vaca obviously is a recurring one.

The "NLRB's tardy assumption of jurisdiction" over fair representation cases (Vaca, 386 U.S. at 138) is "significant in determining whether such power was actually conferred." Trade Comm'n v. Bunte Bros., 312 U.S. 349, 352 (1940). Unlike the Federal Labor Relations Act, 5 U.S.C. § 7114(a)(1) (App. p. 86) which is applicable to governmental employees, the NLRA does not speak to fair representation issues. Karahalios v. Federal Employees, 489 U.S. 527, 534 (1988).

The duty of fair representation under the Railway Labor Act and the NLRA arises by implication and of constitutional necessity from the legislative grant to unions of the right

to act as an exclusive bargaining agent. Steele v. L. & N. R. Co., 323 U.S. 192, 189-199, 202-203 (1944); O'Neill, 499 U.S. at 65. As explained in Breininger, 493 U.S. at 86-87:

> We need not decide the appropriate scope of §§ 8(b)(1)(a) and 8(b)(2) because we reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice.
>
> . . .
>
> The duty of fair representation is not intended to mirror the contours of Sec. 8(b); rather, it arises independently from the grant under 9(a) . . . of the union's exclusive power to represent all employees in a particular bargaining unit.

Violation of Sec. 9(a) is not listed as an unfair labor practice.

The status of a breach of the duty of fair representation as an unfair labor practice was noted and reserved in Huffman, 345 U.S. at 332 n. 4, the first

fair representation case to reach this Court. The issue was again noted and reserved in 1962 (Borden), 1964 (Huffman), 1967 (Vaca) and 1983 (DelCostello). The issue is ripe for review.

III. THE DECISIONS OF THE BOARD AND THE COURT BELOW ARE WRONG: A RECRUITMENT AND DISPATCH SYSTEM WHICH IS (A) PREDICATED ON THE WORK RECORD AND REPUTATION FOR RELIABILITY OF APPLICANTS AND (B) ACTUATED BY A DESIRE TO REFER ONLY QUALIFIED AND DEPENDABLE WORKERS DOES NOT VIOLATE THE DUTY OF FAIR REPRESENTATION.

The Board (App. p. 56) and the Court below (App. pp. 23-24) held that a per se violation occurs if a union dispatches workers "without objective criteria." This issue was reserved in Breininger, 493 U.S. at 85 n.9. It was decided adversely to the Board in "the unfair labor practice context." Breininger, 493 U.S. 89 n.12, citing Teamsters v. NLRB, 365 U.S. 667 (1961). See also: Labor

Board v. News Syndicate Co., 365 U.S. 695, 699 (1961): "We will not assume . . . discrimination . . . ."

Local 32 dispatched 15 qualified rig welders to fill 13 jobs. Only two members of Local 32 were dispatched. Neither was hired. No rig welders were dispatched from the state of Washington. Five were dispatched from Bakersfield, California, the home of one of the Charging Parties.

According to the ALJ, Local 32 "attempted to refer only qualified and dependable welders." (App. p. 51) At no point did the "General Counsel . . . contend that [Local 32] specifically discriminated against" Charging Parties. Indeed, a contrary stipulation was entered into the record. (App. pp. 69-70) This is not the kind of stuff which supports a finding that Local 32 acted

arbitrarily, discriminatorily or in bad faith. Vaca, 386 U.S. at 190. Compare: Breininger, 493 U.S. at 70 (refusal to dispatch political opponents) and Steele, 323 U.S. at 195 (denial of job opportunities based on race).

If necessary, the issue reserved in Breininger should be decided and, if decided, resolved in favor of the Petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED this 8th day of August, 1995.

Respectfully submitted,

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